IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA-09-0578

HERMAN GONZALES; FAWN LYONS; KEN LAUDATO; LAWRENCE WALKER; GARY MANSIKKA; GARY GALETTI; GREG WHITING; MARVIN KRONE; RICHARD BLACK; JIM KELLY; CHRIS SOUSLEY, and all others similarly situated,

Plaintiffs and Appellees,

v.

MONTANA POWER COMPANY; NORTHWESTERN CORPORATION, a Delaware Corporation; PUTMAN AND ASSOCIATES, INC., a Montana corporation; NORTHWESTERN ENERGY; NORTHWESTERN CORPORATION d/b/a NORTHWESTERN CORPORATION as a reorganized debtor, subsequent to its plan confirmation, herein after referred to as NOR; and JOHN DOES II and III and JOHN DOES IV thru XX,

Defendants and Appellant.

DEFENDANT NORTHWESTERN CORPORATION AS A REORGANIZED DEBTOR'S RESPONSE TO APPELLEE'S MOTION FOR EXPEDITED PROCEEDINGS AND SUSPENSION OF THE RULES

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NorthWestern Corporation, as a reorganized debtor, subsequent to its bankruptcy plan confirmation, and also referred to in this matter as "NOR," the Appellant above-named, submits this response to Appellees' motion for expedited proceedings and suspension of the rules and requests Appellees' motion be denied.

Appellees' motion requests essentially two things. First, Appellees' request that this Court not allow an extension of the briefing deadlines in this appeal. However, on December 16, 2009, Appellees filed a response to NOR and Putman & Associates motions for an extension of time, suggesting an extended briefing

schedule agreeable to all parties and filing a proposed order setting forth the extended briefing schedule. Thus, the issue of briefing schedule is not in dispute. Second, Appellees request a suspension of the rules and expedited appeal – that is that this Court place this appeal ahead in priority of the many other cases awaiting decision on appeal. Appellees have failed to show adequate reason this case should receive expedited treatment.

A. Appellees' Fail to Show Adequate Reason for an Expedited Appeal.

Montana R. App. P. 29 provides that in an appropriate case, this Court may suspend the rules of procedure and expedite a decision on appeal. It is NOR's understanding that this Court appreciates well the Court's heavy workload and attempts to process all appeals in an expeditious manner. The effect of filing motions to expedite an appeal is that other litigants whose cases are pending before the court are delayed, and in an appropriate case where an appeal is expedited, the opinions handed down to other litigants whose cases are pending before this Court are necessarily delayed. Certainly every litigant believes their appeal is important and deserves prompt resolution. Thus, a party filing an extraordinary motion to expedite an appeal should have extraordinary reasons for seeking such relief. *See e.g., In re: Rory M. Walsh*, 229 Fed.Appx 58 ("expedition . . . requires an exceptional reason."); *see also* 9th Cir. R. 27-12 (allowing expedited appeal if good cause exists, and setting forth examples of good cause).

NOR acknowledges that expedition may be appropriate in certain cases, for example where the controversy may become moot absent expedition, a criminal defendant is unlawfully incarcerated, or where matters of life and death are at issue. *See e.g.*, 9th Cir. R. 27-12. All of these issues come before this Court and are deserving of priority in their resolution.

Appellees, on the other hand, have failed to argue any facts that show this appeal deserves priority. Rather, their own facts show the Appellees have let this case languish since its filing over 10 years ago with little action until recently. While it is true that the case in the district court was stayed approximately two years by NorthWestern Corporation's bankruptcy, Appellees suggest no reason they could not have pursued this case in a more timely and expeditious manner for the remaining 8 plus years this case has been pending in the district court. Appellees contention that class members are "aging" during the pendency of this litigation is not good cause for expedition, as the same is true in any case on appeal. *See* Affidavit of Lon Dale at ¶11.

Appellees' motion for expedited appeal simply is not based upon any extraordinary reasons or good cause to bump other appeals from their priority to accommodate Appellees' unsupported contention that their case is more important than anyone else's.

B. Appellee's Motion Shows Why this Appeal Has Merit.

Appellees suggest this is not a complicated appeal involving an abuse of discretion determination, in essence suggesting the issue before the Court is a simple one and that NOR's appeal lacks merit. However, Appellees' motion, in citing the district court's ordered class definition (Appellees' motion at 3-4) shows at least one reason why this appeal has merit and should be considered in detail and in due course by this Court.

The district court's ordered class definition provides that certain MPC employees are in the class definition if they fall under one of the following catergories: "a) sustaining damages because of MPC's improper claims handling and adjusting procedures, or b) sustaining damages because of NWE's improper claims handling and adjusting procedures; or c) sustaining damages because of NOR's improper claims handling and adjusting procedures; or d) sustaining damages because of Putman's improper claims handling and adjusting procedures that were the obligation of Putman at third-party administrator for MPC, NWE and NOR, as an independent reviewer for MPC." *See* District Court 9/30/09 Order at 4, cited in Appellee's motion at 4.

Such "fail-safe" class definitions, which require an improper determination of the merits prior to ascertaining the class members and which only bind class members if the ultimate judgment entered is favorable to the plaintiffs, are

routinely rejected as inappropriate. *See e.g.*, *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980)(rejecting fail-safe class); *Nudell v. Burlington Northern & Santa Fe Railway Company*, 2002 WL 1543725, *2-3 (D.N.D. July 11, 2002)(rejecting class definition which "too closely identifies the class definition with a merits determination . . ."); *Dafforn v. Rousseau Assoc., Inc.*, 1976 WL 1358, *1 (N.D.Ind. July 27, 1976)(rejecting class definition that included homeowners who were charged "an artificially fixed and illegal brokerage fee" as an improper fail-safe class which required a decision on the ultimate issue in the case to determine who was in the class); *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000)(collecting numerous cases holding that a class definition which rests on the paramount liability question, and from which class members cannot be presently ascertained, must fail as an inappropriate fail-safe class).

The District Court's ordered class definition involved in this appeal requires, in order to determine who the class members are who will receive class notice and be bound by this action, requires a preliminary determination that the individual suffered damages because of the alleged improper claims handling practices of the various named defendants. This Court has not heretofore directly addressed the problems which arise from the District Court's fail-safe class definition, though Mont. R. Civ. P. 23 is substantially the same as its federal counterpart discussed in the cases cited above. *See e.g.*, *Mattson v. Montana Power Co.*, 2009 MT 286, ¶¶

57-68, 352 Mont. 212, 215 P.3d 675 (noting federal rule regarding class certification is nearly identical to Montana rule and adopting federal court's interpretation of Fed. R. Civ. P. 23 certification requirements).

NOR's appeal of the class certification issue will require full and complete briefing, and possible argument regarding this and other issues which NOR will address in its appeal brief. NOR intends to address additional reasons class certification is inappropriate in this case, including the District Court's failure to consider the certification criteria adopted in *Mattson*, *supra*. These are complex class-action issues, which are appropriate for appeal and decision by this Court. However important these decisions are, they are not the type of extraordinary and emergency issues that require priority above other appeals already pending.

CONCLUSION

For these reasons, NOR requests this Court deny Appellees' motion for suspension of the rules and for an expedited appeal.

Dated this 21st day of December, 2009.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By _____
Chad E. Adams

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of December, 2009, I mailed a true and correct copy of the above and fore going by the United States Postal Services, postage prepaid, addressed to the following counsel of record:

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